

26
No. 108, Original

Supreme Court, U.S.

FILED

DEC 29 1994

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

October Term, 1994

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

**NEBRASKA'S RESPONSE TO WYOMING'S
EXCEPTIONS TO THE SPECIAL
MASTER'S THIRD INTERIM REPORT**

DON STENBERG

*Attorney General of Nebraska
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682*

RICHARD A. SIMMS

*Counsel of Record
Special Assistant Attorney General*

JAMES C. BROCKMANN

JAY F. STEIN

SIMMS & STEIN, P.A.

*430 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880*

December 29, 1994



IN THE
Supreme Court of the United States
October Term, 1994

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defendant.

NEBRASKA'S RESPONSE TO WYOMING'S
EXCEPTIONS TO THE SPECIAL
MASTER'S THIRD INTERIM REPORT

QUESTIONS PRESENTED

Pursuant to Supreme Court Rules 24.1(a) and 14, the questions presented should include all questions raised, be short and concise, avoid argument and repetition, and be expressed in the terms and circumstances of the case. Rule 24.2 provides that an additional listing of the questions presented need not be provided unless the respondent is dissatisfied with the questions presented by the other side.

In regard to each of its exceptions, Wyoming's statement of the question presented is not framed by the circumstances of the case, *i.e.*, by the reasoning underlying Master Olpin's recommendations. Properly framed, they are:

1. Whether the Court should relitigate Wyoming's attempt in the original proceedings to replace the percentage apportionment in ¶ V of the Decree with a mass allocation of natural flow and storage water based on quantitative limitations on water uses in Nebraska.

2. In balancing the equities that would derive from new development in Wyoming whether Nebraska should be precluded from assessing the countervailing equities that would be adversely impacted in Nebraska.

3. Whether return flows and the inflows from Horse Creek, which enters the North Platte River below Tri-State Dam, formed an intrinsic part of limiting the 75% / 25% apportionment to canals diverting above Tri-State.

4. Whether Wyoming can deplete surface waters apportioned to Nebraska in ¶ V of the Decree by pumping the same water out of the ground.

In deciding whether to accept, reject, or modify Special Master Olpin's Third Interim Report, the Court should address the questions actually presented by his recommendations as opposed to the argumentatively idealized questions presented by Wyoming.

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	8
POINT I. ACCEPTANCE OF WYOMING'S FIRST COUNTERCLAIM, FIRST CROSS-CLAIM, AND FOURTH CROSS-CLAIM WOULD AUTHORIZE THE RELITIGATION OF THE BASIC ISSUE DECIDED IN 1945 AND COMMISSION THE DEMISE OF THE EXISTING APPORTIONMENT	9
A. Wyoming's Original Counterclaim. . .	10
B. Wyoming's Proposed First Counterclaim, First Cross-Claim, and Fourth Cross-Claim.	13
C. The Apportionment made by Special Master Doherty and the Court in 1945 did not Rely on Evidence of Beneficial Use.	15
D. The Nature of the Evidence Required to Make Beneficial Use Determinations is Categorically Different than the Evidence Received in the Original Proceedings.	16
E. Wyoming is Seeking a Categorically Different Apportionment.	18
POINT II. THE DECREE CAN BE MODIFIED TO ADDRESS MATTERS THAT HAVE TO BE RESOLVED IN THE FIRST INSTANCE BASED ON A BALANCING OF CURRENT EQUITIES	22

	<u>Page</u>
A. The Court has Decided that Certain Matters May Have to be Resolved in the First Instance in these Proceedings and that Doing so Requires a Balancing of Current Equities.	24
B. In the Original Litigation, the Court did not Limit the Scope of Evidence to Needs and Impacts above Tri-State Dam.....	29
POINT III. THE CONTRIBUTIONS OF HORSE CREEK TO THE NEEDS OF NEBRASKA USERS BELOW TRI-STATE ARE AN INTRINSIC PART OF THE APPORTIONMENT OF NATURAL FLOWS FOR DIRECT DIVERSIONS ABOVE TRI-STATE ..	30
POINT IV. WYOMING CANNOT DEplete SURFACE WATERS APPORTIONED TO NEBRASKA BY PUMPING THE WATER OUT OF THE GROUND ...	35
A. The Impacts of Wyoming's Groundwater Pumping on Nebraska's Apportioned Surface Flows are Significant.	37
B. Groundwater Pumping That Takes Nebraska's Apportioned Water Presents a Legal As Opposed to an Equitable Issue.	39
CONCLUSION	40

TABLE OF AUTHORITIES

	Page
FEDERAL CASES	
<i>Arizona v. California</i> , 373 U.S. 546 (1963)	25
<i>Arizona v. California</i> , 376 U.S. 340 (1964)	37
<i>Colorado v. New Mexico</i> , 459 U.S. 176 (1982)	32
<i>Kansas v. Colorado</i> , 206 U.S. 46 (1907)	39, 40
<i>Kansas v. Colorado</i> , 475 U.S. 1079 (1986)	38
<i>Missouri v. Illinois</i> , 200 U.S. 496 (1906)	39, 40
<i>Nebraska v. Wyoming</i> , 325 U.S. 589 (1945), <i>modified</i> , 345 U.S. 981 (1953)	2, 3, 4, 22, 32, 34
<i>Nebraska v. Wyoming</i> , 479 U.S. 1051 (1987)	10
<i>Nebraska v. Wyoming</i> , 485 U.S. 931 (1988)	27
<i>Nebraska v. Wyoming</i> , 507 U.S. _____, 113 S. Ct. 1689 (1993)	11, 23, 24, 25, 30, 40
<i>Nebraska v. Wyoming</i> , 507 U.S. _____, 113 S. Ct. 1941 (1993)	27
<i>Texas v. New Mexico</i> , 446 U.S. 540 (1980)	37
<i>Texas v. New Mexico</i> , 462 U.S. 554 (1983)	37
STATUTES AND COURT RULES	
Arkansas River Compact, 63 Stat. 145 (1949)	38
Pecos River Compact, 63 Stat. 159 (1949)	37
Reclamation Act of 1902, 43 U.S.C. § 372 (1988) ...	14
S. Ct. R. 24.1(g)	1
S. Ct. R. 24.2	1
MISCELLANEOUS	
2 W.A. Hutchins, <i>Water Rights Laws in the Nineteen Western States</i> (1974)	32
First Amended Complaint at ¶ 8, <i>Kansas v. Colorado</i> , No. 105, Original	38

IN THE
Supreme Court of the United States
October Term, 1994

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

**NEBRASKA'S RESPONSE TO WYOMING'S
EXCEPTIONS TO THE SPECIAL
MASTER'S THIRD INTERIM REPORT**

STATEMENT OF THE CASE

The Supreme Court Rules require a "concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate references to . . . the record."¹ The rules also provide that "no statement of the case need be made beyond what may be deemed necessary to correct any inaccuracy or omission in the statement by the other side."²

While Wyoming argues that the scope of the case should be defined geographically, Wyoming has neglected to set forth the historical facts material to the Court's consideration of the matter.

The original proceedings involved the entire North Platte River and the Platte River to Grand Island,

¹ S. Ct. R. 24.1(g).

² S. Ct. R. 24.2.

Nebraska.³ Equities were considered in Colorado, Wyoming, and Nebraska by river sections. Evidence regarding water uses extended down to Kearney, Nebraska, some 300 miles below Tri-State Dam.⁴ After the close of the evidence, however, Nebraska agreed that it would not demand natural flow from the North Platte River in Wyoming to satisfy irrigation demands east of Bridgeport.⁵ Accordingly, Special Master Doherty removed the lands east of Bridgeport from any "direct involvement in the case."⁶ There remained a dispute, however, whether the lands between Tri-State Dam and Bridgeport should receive natural flow directly from Wyoming.⁷

In evaluating how to accomplish an equitable apportionment, the parties focused on the section between Whalen, Wyoming, and Bridgeport, Nebraska, where most of the irrigated acreage is located. Extensive evidence was introduced relating to the total water supply in this reach.⁸ The

³ Report of Michael J. Doherty, Special Master, *Nebraska v. Wyoming*, No. 8, Original at 20, 92 ("Doherty Report"); see also *Nebraska v. Wyoming*, 325 U.S. 589, 593 (1945), modified, 345 U.S. 981 (1953).

⁴ Doherty Report at 96-99.

⁵ *Id.* at 92. The commencement of operations at Kingsley Dam in central Nebraska in 1941 enhanced the available water supply east of Kingsley, thereby diminishing the need for upstream natural flow during the irrigation season. *Id.* at n.2. Largely because of Kingsley Dam, Nebraska was persuaded that the lands east of Bridgeport could safely be removed from consideration in the apportionment of direct natural flow by the Special Master.

⁶ *Id.*

⁷ *Id.*

⁸ The Special Master divided this reach into two sections, Guernsey Reservoir or Whalen Dam to Tri-State Dam and Tri-State to Bridgeport. In the former reach, referred to as the "pivotal section of the entire river" or the "critical section," he

(cont'd)

available supply consisted of upstream flows passing Whalen Dam, accretions to the system from tributaries, return flows, and groundwater accretions. Primary sources included North Platte River flows from above Guernsey Reservoir, inflows from the Laramie River and Horse Creek, storage water from Pathfinder Reservoir, and return flows above and below the state line. Special Master Doherty expressly examined water supplies and demands below Tri-State Dam, as well as in other reaches of the river.

The evidence adduced at trial established a direct relationship between diversions above Tri-State Dam and a resulting supply for downstream uses in the form of return flows. Approximately 60 percent of the diversions at or above Tri-State Dam was not consumed and instead was returned to the river as return flow for reuse downstream. Only because Nebraska's equitable interests below Tri-State were being satisfied by return flows and other local sources was Master Doherty able to conclude that Nebraska lands below that point had no equitable claim for direct flow originating in Wyoming or Colorado.⁹

In exchange for eliminating the demand for water diverted above Tri-State Dam for use on Nebraska lands

analyzed long-term means of water supplies and the mean for the drought period of 1931-1940. *Id.* at 53, 146; *see also* 325 U.S. at 604. The long-term means for the Whalen Dam to Tri-State Dam reach advocated by the parties were 1,352,000 acre feet according to Nebraska, 1,321,700 acre feet according to Wyoming, and 1,308,700 according to Colorado. Doherty Report at 64. The Special Master determined, however, that the drought period was most indicative of a dependable supply, concluding that the seasonal average supply between 1931-1940, was 1,058,645 acre feet. *Id.* at 67 (Table III). In concept, it was this fluctuating supply that was apportioned 75%/25% in ¶ V of the Decree.

⁹ *Id.* at 9; *see also id.* at 92-96. While concluding that the Nebraska flows above Tri-State had no "direct" claim for natural flows above Tri-State, Doherty also concluded that the Nebraska lands had an indirect claim, *i.e.*, they relied on return flows which provide most of the local supplies.

between Tri-State and Bridgeport, Master Doherty took the evidence necessary to establish that these lands would be satisfied by return flows and local supplies. Special Master Doherty specifically relied on Wyoming Exhibit Nos. W-177 and W-178 to insure that the Nebraska lands below Tri-State would continue receiving sufficient North Platte waters:

Wyoming's Exhibit 177 shows in detail the location of all channel and tributary accretions to the river in the [Tri-State Dam to Kingsley Reservoir] section, and Wyoming's Exhibit 178 sets up the accretions for the 1931-1940 period against the diversion requirements of the canals in the section. Together these exhibits furnish an apparent demonstration that the local supplies, even during the drouth period, were adequate to supply the needs of the canals without calling upon up-river water. Neither the supply data nor the mathematics of these exhibits is questioned by Nebraska.¹⁰

Wyoming Exhibit Nos. W-98, W-177, and W-178 were designed to show that sufficient return flows and local supplies were available to Nebraska so that there would be no need for Nebraska to call for water from Wyoming. Wyoming's premise in the original litigation was that the Nebraska canals diverting downstream of Tri-State Dam could rely on these local sources as their sole source of natural flow. Special Master Doherty and the Court accepted Wyoming's premise.¹¹

SUMMARY OF ARGUMENT

Point I

Special Master Olpin recommended against the exercise of jurisdiction over Wyoming's First Counterclaim and First

¹⁰ *Id.* at 94-95 (footnote omitted).

¹¹ *Id.* at 94-96; 325 U.S. at 596, 607, 655.

Cross-Claim because they do not seek to further define the existing apportionment, but to replace it with a quantification of Nebraska's entitlement based on a beneficial use standard.¹² Recognizing the differences between Wyoming's initial counterclaim in 1987 and its proposed amended counterclaim, Master Olpin concluded that the Court disposed of the former in deciding in 1993 that the diversion and acreage limitations in ¶ IV of the Decree were not beneficial use limitations on Nebraska canals, either individually or cumulatively.

Wyoming's proposed First Counterclaim, First Cross-Claim, and Fourth Cross-Claim seek to impose beneficial use limitations based on the actual requirements of the Nebraska canals as opposed to the "limitations" set forth in ¶ IV of the Decree. None of the evidence requisite to a determination of actual beneficial use requirements was adduced in 1945. Accordingly, Wyoming's proposed amendments would lead not only to a conceptually different apportionment, but to one that would have to be based on altogether new evidence.

Point II

Wyoming claims that the pleading amendments to its affirmative case would simply "define" the existing apportionment. There are two reasons why Wyoming has not been forthright in attempting to change the existing apportionment. First, Wyoming does not want to reveal that it is seeking a quantified apportionment because doing so would fall prey to principles of finality and repose resulting from the Court's rejection of a quantified apportionment in 1945. Second, Wyoming is trying to avoid a balancing of all of the equities that would be brought to bear on a new apportionment in the ordinary course.

¹² See generally Owen Olpin, Special Master, Third Interim Report on Motions to Amend the Pleadings at 55-57 (Sept. 9, 1994) (Docket No. 699) ("Third Interim Report").

Similarly, Wyoming insists that the case be viewed as one to protect the existing apportionment in order to limit the evidence of potential injury available to Nebraska in Nebraska's affirmative case. With respect to the proposed developments in Wyoming which would deplete the continuing contributions of the Laramie River, for example, it is Wyoming's object to limit Nebraska's proof of injury to the uses that formed the basis of the apportionment in 1945 as opposed to the actual uses which would form the basis of additional equitable relief.

In resolving the cross motions for summary judgment in 1993, the Court declined to restrict the scope of this case to the enforcement of rights determined in 1945. The Court stated that where there is no pre-existing right to interpret or enforce, the evidentiary inquiry will entail the same sort of balancing of equities that occurs in an initial proceeding to establish an equitable apportionment. The Court determined that rights would have to be resolved in the first instance and that the Decree would have to be modified.

While the Court's resolution of the scope of the case in 1993 is clear, Wyoming tries to show that it is inconsistent with the court's denial in 1988 and 1991 of two motions to amend that were filed by Nebraska. The first motion bears no relation to the pending pleading amendment. The second was denied for lack of ripeness. That decision does not conflict with the Court's explanation of the scope of the case in any respect.

The Master has recommended against accepting Nebraska's second attempt to apportion the nonirrigation season flows of the North Platte, partly on the understanding that the resolution of the issues already in the case will inform an apportionment of the nonirrigation season flows, which the Master believes will ultimately be necessary. If the impact of new development in Wyoming will adversely affect nonirrigation season interests in Nebraska, such evidence should not be precluded in advance of trial.

Point III

In 1945 the Court predicated the apportionment of natural flow above Tri-State Dam on Wyoming's assurance of continuing return flows below Tri-State, including the flows of Horse Creek, in amounts sufficient to satisfy downstream needs. The *quid pro quo* for relieving Wyoming of the need to contribute directly to the satisfaction of downstream uses was Wyoming's guarantee that the downstream uses would be satisfied indirectly through continued return flows. With respect to the return flow contribution of Horse Creek, which enters the North Platte River below Tri-State, Wyoming now seeks to renege on its assurances in 1945 by depleting the flows. Wyoming's argument that Nebraska is seeking a new apportionment of unapportioned Horse Creek flows is beside the point. The maintenance of Horse Creek return flows is an essential predicate of the existing apportionment.

Point IV

With respect to existing and proposed groundwater development in Wyoming, Wyoming maintains that the existing Decree does not limit the use of groundwater. While acknowledging that pumping the water out of the ground is tantamount to diverting it out of the river, Wyoming urges that groundwater escapes the apportionment. Wyoming's argument, however, would vitiate the apportionment.

Wyoming also attempts to hide from its depletions of apportioned surface flows by urging that the Court should not force the conjunctive management of surface and groundwater on Wyoming when Nebraska's laws do not facilitate such management.¹³ The issue, according to Wyoming, is an equitable one. Pursuant to the Decree, however, the issue is a legal one. Wyoming is the upstream

¹³ Conjunctive management is a term which describes the joint administration of hydrologically related surface and groundwater to prevent the impairment of rights dependant on either source.

state admittedly depleting apportioned surface flows through groundwater pumping. Nebraska is not the one obligated to avoid the depletion of surface flows apportioned to a downstream state.

ARGUMENT

At the heart of the dispute presently before the Court is whether the Decree can be modified, as Nebraska requests, or relitigated, as Wyoming requests. The resolution of the dispute will determine the scope of relevant evidence that will be available to the parties. In this regard, Wyoming's strategy has been to urge that this case is "one to protect and to give effect to the existing apportionment." Exceptions of the State of Wyoming to the Third Interim Report of the Special Master and Brief in Support at 12 (Nov. 25, 1994) ("Wyoming's Exceptions" or "Wyoming's Brief in Support of Exceptions"). Wyoming's object is twofold.

Initially, as discussed in Point I, Wyoming is fully aware that the changed conditions since the entry of the Decree in 1945, including changes in the competing demands, would have to be brought to bear on any new apportionment of North Platte waters. Wyoming is also aware that the changes in conditions since 1945 weigh heavily in Nebraska's favor. For these reasons, Wyoming has characterized its affirmative case, *i.e.*, its counterclaim and cross-claims, as seeking to do nothing but "give effect" to the existing apportionment. Accordingly, Wyoming is seeking to avoid the presentation of evidence which would explicate the full array of changed conditions since 1945 with respect to the restructuring of the apportionment formula that Wyoming actually seeks. By characterizing its affirmative case as an attempt to "further define" the existing apportionment, Wyoming also hides from the fact that the quantification it is requesting was presented to the Court in 1942 and again in 1945 and rejected.

Similarly, as described in Point II, Wyoming insists that the case be viewed as one to protect the existing apportionment in order to limit the evidence of potential injury available to Nebraska in Nebraska's affirmative case. With respect to the proposed developments in Wyoming which would deplete the continuing contributions of the Laramie River, for example, it is Wyoming's object to limit Nebraska's proof of injury to the uses that formed the basis of the apportionment in 1945 as opposed to the actual uses which would form the basis of additional equitable relief.

The question before the Court which cuts through the discrete issues framed by the proposed pleading amendments is whether evidence of changed conditions over the past fifty years will be relevant in those areas where Wyoming and Nebraska are now seeking to modify the Decree. Wyoming would like to modify the Decree on the basis of changed conditions, but limit Nebraska to the equities balanced in 1945. In the limited areas in which Nebraska is seeking a modification of the Decree, Nebraska would like to do so on the basis of an evaluation of changed conditions from the perspective of both states.

POINT I

ACCEPTANCE OF WYOMING'S FIRST COUNTER- CLAIM, FIRST CROSS-CLAIM, AND FOURTH CROSS-CLAIM WOULD AUTHORIZE THE RELITIGATION OF THE BASIC ISSUE DECIDED IN 1945 AND COMMISSION THE DEMISE OF THE EXISTING APPORTIONMENT

Special Master Olpin recommended that the Court deny Wyoming's motion to add its First Counterclaim and First Cross-Claim because Wyoming "seeks to transform the 1945 equitable apportionment . . . from a proportionate sharing of the natural flows into a defined and quantified apportionment that would limit Nebraska's share by a beneficial use standard." Third Interim Report at 55 (footnote omitted). Master Olpin's recommendation resulted from

1) his understanding of Wyoming's position in the 1945 proceedings, 2) the fact that Special Master Doherty declined to calculate canal requirements on the basis of crop demands and irrigation efficiencies, and 3) the necessary conclusion that doing so could only produce a categorically different apportionment predicated on evidence bearing no resemblance to the evidence adduced during the original trial.

A. Wyoming's Original Counterclaim.

Pursuant to the Court's order of January 20, 1987, granting Nebraska leave to file its petition, Wyoming filed its answer, certain affirmative defenses, and a singular counterclaim. *See Nebraska v. Wyoming*, 479 U.S. 1051 (1987) (Docket No. 4a). The counterclaim was asserted only against Nebraska. With respect to the 75%/25% apportionment of natural flows in ¶ V of the Decree, Wyoming's original counterclaim had two parts:

Nebraska has intentionally circumvented and violated the Decree, and continues to do so, by the following actions:

(a) By demanding natural flow water for diversion by irrigation canals at and above Tri-State Dam (including the Ramshorn Canal) in excess of the present beneficial use requirements of the Nebraska lands entitled to water from those canals under the Decree;

(b) By demanding natural flow and storage water from sources above Tri-State Dam and by-passing it or diverting it for uses below Tri-State Dam that are not recognized or authorized by the Decree

Wyoming Answer to Petition, Motion for Leave to File Counterclaim and Counterclaim at 8 (Mar. 18, 1987) (Docket No. 5) ("Wyoming's Counterclaim").

The first part of the original counterclaim referred to alleged demands for natural flow "in excess of the *present* beneficial use requirements" of the Nebraska canals diverting in the Whalen to Tri-State reach, *i.e.*, the canals specified in ¶ IV of the Decree. *Id.* (Emphasis added). The counterclaim made no independent assertion that Nebraska was being wasteful or inefficient. Wyoming's position was that "the water requirements of the Nebraska canals diverting between Whalen and Tri-State [had been] specifically litigated and determined" in 1945. Wyoming Brief in Response to Motions for Summary Judgment of Nebraska and the United States at 37 (Apr. 26, 1991) (Docket No. 334) ("Wyoming's Response Brief on Summary Judgment"). The "limitations" appearing in ¶ IV of the Decree, in Wyoming's view, were "the *present* beneficial use requirements." See Wyoming's Counterclaim at 8.

Nebraska addressed the issue directly in its Motion for Partial Summary Judgment of March 1, 1991. Nebraska asked the Court "to enter judgment . . . declaring as a matter of law that . . . the Decree does not contain restrictions or limitations on diversions or acres irrigated by Nebraska appropriators." Nebraska's Motion for Partial Summary Judgment and Brief in Support of Motion at 1-2 (Mar. 1, 1991) (Docket No. 296). Wyoming responded to the motion by noting that "[t]he summary judgment that Nebraska seeks in this regard goes directly to Wyoming's counterclaim that diversions in excess of the requirements determined by the Court in 1945 constitute a violation of the Decree." Wyoming's Response Brief on Summary Judgment at 37. In its decision on the motions for summary judgment of April 20, 1993, the Court agreed with Nebraska and the United States that the diversion and acreage "limitations" in ¶ IV of the Decree did not constitute "restrictions on the quantities of water" the Nebraska canals could divert, "either individually or cumulatively." *Nebraska v. Wyoming*, 507 U.S. ___, 113 S. Ct. 1689, 1701 (1993).

In Master Olpin's Third Interim Report he quotes the United States, noting that there is "'little, if anything, left' of Wyoming's 1987 counterclaim" as a result of the Court's 1993 decision. Third Interim Report at 23-24. Based on Wyoming's own characterization of its counterclaim and Nebraska's related motion for summary judgment, there is *nothing* left of the "beneficial use" aspect of Wyoming's original counterclaim insofar as Nebraska's apportionment is concerned.¹⁴

In its brief in support of its pending exceptions, Wyoming attempts to imply that beneficial use in general was a part of its original counterclaim. Alluding to affidavits appended to its Second Motion for Summary Judgment in 1991, as opposed to anything filed in 1987, Wyoming now asserts that it was complaining of "wasteful and inefficient practices" instead of alleged diversions in excess of the "limitations" in ¶ IV of the Decree. Wyoming's Brief in Support of Exceptions at 3. Wyoming equates the beneficial use allegation in subparagraph (a) of its original counterclaim with subparagraph (b), *i.e.*, the allegation that Nebraska has intentionally by-passed water diverted above Tri-State for use below Tri-State, in order to try to resurrect the beneficial use or water use limitations component of the original

¹⁴ The Master correctly concludes that subparagraph (b) of the original counterclaim remains intact, *i.e.*, whether Nebraska has demanded natural flow and storage water from sources above Tri-State and intentionally by-passed for "the benefit of irrigation diversions" below Tri-State. Third Interim Report at 24. In Wyoming's letter to the Honorable Francis J. Lorson, dated September 20, 1994, Wyoming stated that Master Olpin's recommendation to the Court "in effect, recommends the dismissal *with prejudice* of Wyoming counterclaims for injunctive relief accepted by the Court in 1987." *Ibid.* at 1. With respect to the beneficial use part of the counterclaim, however, in its 1993 decision the Court decided, contrary to Wyoming's position, to adopt Master Olpin's recommendation on the subject in his Second Interim Report. Master Olpin now is doing no more than giving effect to the Court's prior decision.

counterclaim. The phrase "in excess of . . . beneficial use requirements," however, does not appear in subparagraph (b) of Wyoming's initial pleading. The beneficial use allegation which Wyoming equates to limitations was contained only in subparagraph (a). Therefore, the concept of beneficial use as distinct from the limitations in ¶ IV was never part of Wyoming's original counterclaim.

B. Wyoming's Proposed First Counterclaim, First Cross-Claim, and Fourth Cross-Claim.

Wyoming's pending motion for leave to file amended counterclaims and cross-claims is conceptually different from its original counterclaim.¹⁵ The fundamental predicate of the proposed First Counterclaim is contained in a section entitled "General Allegations." Paragraph 5 reads:

The equitable apportionment implemented by the Decree was intended to protect the supply of irrigation water to meet the reasonable beneficial use requirements of the Nebraska lands under canals that divert from the North Platte River at and upstream of Tri-State Dam.

Wyoming's Amended Counterclaims and Cross-Claims at 3 (¶5). The specific beneficial use allegation now appears in ¶ 11 of the proposed First Counterclaim:

Nebraska has circumvented and violated the equitable apportionment by demanding natural flow water for diversion by irrigation canals at and above Tri-State Dam in excess of the beneficial use requirements of the Nebraska lands entitled to

¹⁵ See generally Wyoming Motion for Leave to File Amended Counterclaims and Cross-Claims, Amended Counterclaims and Cross-Claims, and Brief in Support of Motion for Leave to File Amended Counterclaims and Cross-Claims (Feb. 18, 1994) (Docket No. 624) ("Wyoming's Amended Counterclaims and Cross-Claims" or "Wyoming's Brief in Support of Amended Counterclaims and Cross-Claims").

water from those canals under the Decree and by demanding that the federal reservoirs in Wyoming, which are described in Paragraph IV of the Decree, bypass water to the Nebraska State Line Canals in excess of the diversion limitations and seasonal volumetric limitations fixed in Paragraph IV of the Decree.

Id. at 4 (¶ 11). It is important to note that Wyoming's underlying allegation pools natural flow and storage water into "the supply of irrigation water" and the "beneficial use requirements" in the counterclaim are no longer the "*present*" requirements in ¶ IV, but are now the alleged *actual* requirements of the Nebraska lands.

Wyoming's First Cross-Claim mirrors its First Counterclaim and asserts the same cause of action against the United States as the operator of the upstream storage reservoirs and as an entity having control over the delivery of natural flows. All of the allegations in Wyoming's First Counterclaim are incorporated in the First Cross-Claim.

The Fourth Cross-Claim accuses the United States of failing to operate the federal reservoirs in accordance with the beneficial use provisions of the Reclamation Act of 1902, 43 U.S.C. § 372 (1988), and the beneficial use provisions in various water delivery contracts. According to Wyoming, the Fourth Cross-Claim "is an extension of the first counterclaim" Wyoming's Brief in Support of Amended Counterclaims and Cross-Claims at 26. Through its Fourth Cross-Claim, Wyoming seeks the same relief as to storage water that the First Counterclaim and First Cross-Claim now seek with regard to natural flow, *i.e.*, the imposition of beneficial use limitations on Nebraska lands and canals.

C. The Apportionment made by Special Master Doherty and the Court in 1945 did not Rely on Evidence of Beneficial Use.

In order to maintain the appearance that it is seeking only to clarify the existing apportionment, Wyoming suggests that the apportionment in 1945 was based on evidence of beneficial use:

Both Special Master Doherty and the Court were well aware of the limits of beneficial use in fashioning the 1945 apportionment. Doherty Report at 15; *Nebraska v. Wyoming*, 325 U.S. at 612-614. It is inconceivable that the Court in 1945 would have ignored a water law principle as fundamental as that of beneficial use in formulating the apportionment. Rather, the Court assumed as an essential underpinning of the apportionment that each state and the federal agencies responsible for administration of water rights under the Decree would continue to be guided by the doctrine of beneficial use and would not allow canals to divert substantially more than their requirements.

Wyoming's Brief in Support of Exceptions at 24. The fact of the matter is that Special Master Doherty and the Court relied on evidence of actual historical diversions to determine the canal requirements — not on proof of beneficial use.¹⁶

A review of the record shows that Wyoming's present attempt to force a quantification of beneficial use on Nebraska's canals is precisely what Wyoming tried to do unsuc-

¹⁶ Wyoming states that it "acknowledges that Special Master Doherty considered historic diversions in determining the requirements of the canals in the pivotal reach." Wyoming's Brief in Support of Exceptions at 24-25. Wyoming urges, however, that "historic diversion was only one of many factors considered by Special Master Doherty." *Id.* Wyoming's statement is patently incorrect.

cessfully in 1942 and again in 1945. The basic tenet of Wyoming's present argument is that Special Master Doherty based his "requirements" column in Tables VII through XIV of his report on evidence of ideal crop requirements, including a scientific evaluation of the amount of irrigation water, adjusted for effective precipitation, irrigation efficiencies, and canal losses, needed to be applied on the lands under the canals. With the sole exception, however, of admittedly inconclusive testimony with respect to lands under the Ft. Laramie Canal by Wyoming's witness, Mr. Nelson, there is no evidence of ideal crop requirements in the record. In arriving at the requirement columns in Tables VII through XIV, Master Doherty relied almost entirely on historical diversions. Generally, Master Doherty based his determinations of "canal requirements" on historical diversions over an appropriate period — sometimes 7 years and sometimes 11 years. The requirements were not based on an independent evidentiary evaluation of crop requirements.

After reviewing the record of the proceedings through 1945, Special Master Doherty's Report, and the original opinion, Special Master Olpin found that "[t]here are no criteria for nor definitions of waste or beneficial use in either the Report or the decree." Third Interim Report at 60 n.151. Accordingly, Wyoming can point to no evidence in the record in the original proceedings upon which Master Doherty or the Court could have made comprehensive canal-by-canal beneficial use determinations.

D. The Nature of the Evidence Required to Make Beneficial Use Determinations is Categorically Different than the Evidence Received in the Original Proceedings.

In order to establish beneficial use requirements, the Court must evaluate evidence of the location and extent of irrigated lands, the kinds and extent of individual crops being grown, the points of surface and groundwater diver-

sion, the nature and extent of water conveyance facilities, effective precipitation, and soil efficiencies.

The object is to determine the irrigation requirement for lands under a given canal. To do so, consumptive use must first be determined. Consumptive use is the unit amount of water used within a given area by plant transpiration, plant synthesis, and evaporation from the plant and adjacent soil. Effective precipitation is that part of the total precipitation that is available to the plant for consumptive use. The consumptive irrigation requirement is consumptive use less effective precipitation.

Various analytical methods are used to determine consumptive use and the consumptive irrigation requirement. Typically, the methods take into account the types of crops grown, the average monthly temperatures, the monthly percentages of yearly daytime hours, and the effective precipitation during the irrigation season.

The irrigation season for each crop is that period when irrigation water is needed for application to beneficial use. For some crops, it would be all or part of the frost-free period, and for other crops it would be all of the frost-free period, plus a pre-frost and post-frost-free period. Analytical guidelines are used to determine the pre-frost and post-frost-free periods for each crop.

Once the consumptive use and the consumptive irrigation requirements are determined, the farm delivery requirement must be determined. It is the amount of water delivered at the farm headgate or at an irrigation well which is necessary to satisfy the consumptive irrigation requirement. It is determined by dividing the consumptive irrigation requirement by the farm irrigation efficiency. The types of soils, the crops, the method of irrigation, and the slope of the fields are major factors affecting farm irrigation efficiency.

Once the farm delivery requirements are determined, the diversion demand must be calculated or empirically evaluated. The principal factors for doing so include the size and

length of canals and laterals, canal lining, soil types, slope, evaporation, and phreatophyte consumption.

Beneficial use requirements cannot be determined without the submission of proof covering the areas outlined above. No evidence of this nature was presented to the Court in the original proceedings.

E. Wyoming is Seeking a Categorically Different Apportionment.

In the proceedings before Special Master Olpin, Wyoming maintained that it was not seeking to reopen the existing equitable apportionment. Conversely, Nebraska and the United States maintained that the relief Wyoming is seeking "would not effectuate the [existing] apportionment, but would fundamentally change it."¹⁷ Master Olpin agreed with Nebraska and the United States that Wyoming's assertion that it is seeking nothing more than clarity is "in actuality, a plea for restructuring the decree in ways that were considered and expressly rejected in the original proceedings." Third Interim Report at 56. In short, Master Olpin concluded that Wyoming's argument is not credible.

The transcript of the argument before Master Olpin on the motions for leave to file the amended pleadings demonstrates that he was correct. Wyoming began its argument by stating that it sought nothing more than a "further definition of Nebraska's apportionment." Transcript of Hearing, July 26 and 27, 1994, at 163-64 ("Tr."). Without explaining the specific nature of the relief sought, Wyoming argued that "restrictions or definition of Nebraska's apportionment are important . . ." *Id.*

¹⁷ Nebraska's Response to Wyoming Motion for Leave to File Amended Counterclaims and Cross-Claims, Amended Counterclaims and Cross-Claims, and Brief in Support of Motion for Leave to File Amended Counterclaims and Cross-Claims at 13 (May 2, 1994) (Docket No. 650).

In response, Master Olpin sought a more specific explanation:

Mr. Cook, doesn't that go back to a debate that was very much a part of the fashioning of the 1945 decree. What you're saying has mass allocation sort of written on it, as I listen to you. The question there was dividing up the river. Wyoming wanted to deliver a block of water to Nebraska. You're saying almost the same thing as I hear. You're saying what we need in order to be able to say Nebraska is not entitled to ask for more water is we need a definition that the 1945 decree clearly didn't provide so that we say when Nebraska gets X quantity, then Nebraska cannot be heard to complain. Is X quantity another name for mass allocation?

Id. at 165-66.

Wyoming responded by stating that it wouldn't "preclude the possibility that the end result would be a suggestion for a mass allocation . . . , [but] Wyoming has not arrived at that conclusion yet at this point." *Id.* at 166. Refusing to answer the question specifically, Wyoming continued to maintain that it simply wanted to "better define" the existing apportionment. *Id.* at 168.

Continuing the colloquy, Master Olpin stated:

. . . [L]et me press you just a little bit more The Court in '45 made the 25-75 split and with only one exception, the Court chose not to go beyond the [proportional] division of the river. . . . Now, the burden of your proposed amendments would say, okay, now we need to do the step that the Court did not do in 1945. We need to define, to quantify, to figure out exactly how much water Nebraska is entitled to call for the uses that are served by that water so that we will be readily able to say no when Nebraska asks for too much. Now, first, will you agree with me thus far that

that's not something the Court did in 1945? That it's something you want done for the first time?"

Id. at 170-71. Wyoming responded by stating: "I think — let me — well, I won't agree." *Id.* at 171.

Oral argument on the pending motions for leave to amend continued for two days before Master Olpin, during which he renewed his inquiry of Wyoming numerous times, articulating the question in different ways. The critical issue, to Master Olpin was whether Wyoming is attempting to limit or quantify Nebraska's apportionment. "The thing I find quite difficult," he continued, "is to derive a number" beyond which Nebraska could no longer demand its 75%. *Id.* at 174-76. Again, Wyoming's response was that the existing apportionment should be further defined. *Id.* at 181-82.

The dialogue continued during the second day of argument with Wyoming pursuing a different approach, *i.e.*, that the Court has already accepted jurisdiction over Wyoming's original counterclaim, which still included its beneficial use assertions. According to Wyoming: "Beneficial use is seldom a precise quantity — and yesterday, we — we bogged ourselves down in talking about well, are you asking for a mass allocation, a quantity of water to be mass allocated." *Id.* at 247. Responding to Wyoming's assertion that a quantification of beneficial use was in the case as a result of the Court's acceptance of Wyoming's original counterclaim — and thus should not present an issue on the pending motion to amend — Master Olpin stated:

Well, but I think that really doesn't quite do it, Mr. Cook. The added elements of seeking a definition and invoking beneficial use as the [criterion] for that definition takes us well beyond what the original counterclaim is talking about and as I thought you almost conceded yesterday, points us back into the direction of mass allocation which you suggested Wyoming may want to revisit in the way of a modification of the decree.

Id. at 251.

By mid-morning, the colloquy had intensified. Wyoming kept stating that it should be able to further clarify the apportionment through some definition of beneficial use. *Id.* at 250-58. While urging that beneficial use was "not a trick concept," however, the relief that Wyoming seeks became clear:

Mr. Cook: . . . I admit Wyoming seeks to modify the decree. We seek some injunction and some clarification.

Master Olpin: And definition.

Mr. Cook: And definition.

Master Olpin: Precise definition so that by a process of subtraction, Wyoming can decide we can use everything except that which has been defined as the Nebraska apportion[ment].

Now, is that the heart of it?

Mr. Cook: That's the very heart of it.

Id. at 258. After two days of broaching the issue, Wyoming finally admitted that it seeks the same quantification of beneficial use in Nebraska that it urged should be adopted after trial in 1942 and which Master Doherty and the Court specifically rejected.

Unlike Wyoming's present reluctance to admit its position, Wyoming's position in the original litigation was clear. Recognizing then that the only evidence of "requirements" had been derived from actual historical diversions, Wyoming argued in its post-trial brief that "[f]or many reasons we do not believe diversions heretofore made in the Whalen/Tri-State Dam section reflect the requirements of beneficial use, or what such requirements will be in the future." Brief of State of Wyoming, Defendant at 156 (Sept. 5, 1942). According to Wyoming then, "[t]he time has arrived in the North Platte basin, although its coming has not been recognized, when diversions must be limited to

the requirements of beneficial use . . .” *Id.* at 165. While both Master Doherty and the Court rejected Wyoming’s position in the original proceedings, that position forms “the very heart” of its position today.¹⁸

POINT II

THE DECREE CAN BE MODIFIED TO ADDRESS MATTERS THAT HAVE TO BE RESOLVED IN THE FIRST INSTANCE BASED ON A BALANCING OF CURRENT EQUITIES

The stated thesis of Wyoming’s exceptions is that “[t]he purpose of this case is to define and protect the existing apportionment, not to adjudicate a new apportionment or enlarge the geographic limit of the apportionment.” Wyoming’s Brief in Support of Exceptions at 13. As applied to

¹⁸ Wyoming also argues that “[i]f the apportionment is defined no more specifically than 75% of the natural flow in the Guernsey Dam to Tri-State Dam section, then Nebraska’s proof will necessarily fail.” Wyoming’s Brief in Support of Exceptions at 16-17. What Wyoming is saying is that the existing apportionment is not enforceable. Wyoming takes the view that a categorically different apportionment, *i.e.*, a quantification of beneficial uses, is needed before Nebraska can begin to prove injury to its equities from proposed upstream depletions. Wyoming’s argument is not that the existing apportionment must be further defined, but that it must be changed to quantitatively define it in the first place.

Wyoming also forgets that the injunctions upstream of the Guernsey Dam to Tri-State reach were imposed to prevent further development and reduction of the flows which are apportioned 75%/25%. Where there were no threats of development, no injunctions were put in place. The Court held that if such threats were to appear, “application may be made at the foot of the decree for an appropriate restriction.” 325 U.S. at 625. This is precisely what Nebraska is now seeking, *i.e.*, restrictions on threatened development which would deplete the natural flows available in the Guernsey to Tri-State reach.

Nebraska's proposed amendments, Wyoming's argument is animated by an ulterior motive.¹⁹ What Wyoming is actually seeking to do, despite the Court's holding in 1993, is to preclude *in limine* the introduction of a significant part of the evidence that will necessarily bear upon proposed development in Wyoming.

When this case was reopened in 1987, it was conceptualized as an action to protect rights decreed in 1945 and for injunctive relief. In 1993, the Court found that certain matters contained in the initial pleadings had not been previously adjudicated, but the Court nevertheless declined "to restrict the scope of the litigation solely to the enforcement of rights determined in the prior proceedings." 113 S. Ct. at 1695. The Court also described the evidence that may be appropriate in considering a modification of the Decree: "[T]he inquiry may well entail the same sort of balancing of equities that occurs in an initial proceeding to establish an equitable apportionment." *Id.* Accordingly, the contentions raised in Wyoming's exceptions regarding the scope of the case and the related question of what evidence is appropriate to consider in modifying the Decree have already been ruled on by the Court.²⁰ Both matters are law of the case and *res judicata*.

¹⁹ To review Nebraska's proposed amendments, *see* Nebraska's Motion for Leave to File Amended Petition, Amended Petition for an Order Enforcing Decree, for Injunctive Relief, and for Modification of the Decree to Specify an Apportionment of the Natural Flows of the Laramie River below Wheatland and to Apportion the Unapportioned Natural Flows of the North Platte River, and Brief in Support of Motion for Leave to File Amended Petition (Feb. 18, 1994) (Docket No. 623) ("Nebraska's Amended Petition" or "Nebraska's Brief in Support of Amended Petition").

²⁰ The evidentiary standard for a modification of the Decree was also set forth. When what is sought is essentially "a reweighing of equities and an injunction declaring new rights and responsibilities," the Court stated that a showing of "substantial injury" is required for a party to be entitled to new equitable relief. 113 S. Ct. at 1696.

A. The Court has Decided that Certain Matters May Have to be Resolved in the First Instance in these Proceedings and that Doing so Requires a Balancing of Current Equities.

The scope of the case was first raised on the cross-motions for summary judgment in 1993. *Id.* at 1689. Wyoming argued then that, as framed by Nebraska's initial pleadings, the case was limited to enforcement of existing rights and that Nebraska could not modify the Decree in any respect. *Id.* at 1694-95. The Court did not agree:

Nebraska also expressly invoked Paragraph XIII, and particularly subparagraphs (c) and (f). As we have said, the Court in those sections retained jurisdiction to modify the decree to answer unresolved questions and to accommodate 'change[s] in conditions' — a phrase sufficiently broad to encompass not only changes in water supply, but also new development that threatens a party's interests. Furthermore, nothing would prevent Nebraska from submitting a new petition if we deemed the original one deficient. *We therefore decline the invitation, at this late date, to restrict the scope of the litigation solely to the enforcement of rights determined in the prior proceedings.*

Id. at 1695 (citations omitted, emphasis added). The Court went on to explain the appropriate scope of evidence:

In a modification proceeding, . . . there is by definition no pre-existing right to interpret or enforce. At least where the case concerns the impact of new development, the inquiry may well entail the same sort of balancing of equities that occurs in an initial proceeding to establish an equitable apportionment.

Id. (citations omitted).

In resolving the parties' cross-motions for summary judgment, the Court enforced those rights asserted in Ne-

braska's Petition which were related to issues determined to have been resolved in 1945, recognizing that the rights deriving from the apportionment "need not be stated explicitly in the decree." *Id.* at 1695. The Court also determined that the resolution of Nebraska's allegations relating to the proposed Deer Creek Project would involve "further relief" pursuant to ¶ XIII(c) and that there was "no pre-existing right to interpret or enforce" with respect to the Laramie River. *Id.* at 1695, 1697-1700. The Court did not determine, however, that these issues were outside the scope of its jurisdiction. Declining to restrict the breadth of the litigation, the Court held that Nebraska's Petition "expressly invoked Paragraph XIII, . . . particularly subparagraphs (c) and (f)," and that the Laramie River and Deer Creek issues were within the Court's exercise of jurisdiction, albeit that the parties' rights would have to be resolved in the first instance and that the Decree would have to be modified. *Id.* at 1695. Under these circumstances, the Court said, the presentation of evidence "may well entail the same sort of balancing of equities that occurs in an initial proceeding to establish an equitable apportionment."²¹ *Id.*

The rationale behind the Special Master's recommendation to allow the introduction of evidence of year-round impacts caused by new development in Wyoming on downstream uses in Nebraska is clear. New projects in Wyoming would have a year-round impact on Nebraska users. Nebraska must be able to present evidence of these impacts when and where they occur. It is not reasonable to place artificial constraints on the consideration of such impacts,

²¹ In an equitable apportionment action, *i.e.*, an action to divide the waters of an interstate stream, the Court seeks to effectuate an equitable division of the benefits of the use of a finite and usually insufficient supply of water. In modern-day equitable apportionment actions, all types and classes of use are weighed in the balance, including irrigation, municipal, industrial, hydropower, recreation, and fish and wildlife uses. *See, e.g., Arizona v. California*, 373 U.S. 546 (1963).

e.g., irrigation season versus the nonirrigation season or above Tri-State versus below Tri-State. Rather, the nature of the proposed projects dictates the nature of the evidence. New developments and contemporaneous uses in Wyoming can not be considered without also considering all contemporaneous impacts and uses in Nebraska.

While the Court's resolution of the matter in 1993 is clear, Wyoming has maintained that it is difficult "to reconcile [this reasoning] in the Court's 1993 opinion with the fact that the Court has twice denied Nebraska leave to bring claims for a new or expanded apportionment." Wyoming's Brief In Support of Exceptions at 14. According to Wyoming:

The only interpretation that gives effect to both the April 20, 1993 opinion and the Court's order denying Nebraska leave to amend is one that distinguishes between modification of the Decree and modification of the underlying equitable apportionment. While the Court has indicated a willingness to consider the need for modification of the Decree to give effect to the original apportionment, it has not opened the case to an unlimited reconsideration of the apportionment or to a complete reweighing of the equities on which the apportionment was based.

Wyoming's Brief in Support of Amended Counterclaims and Cross-Claims at 4.

Neither the Court's denial of Nebraska's 1988 motion to amend petition nor its denial of Count I of Nebraska's 1993 motion to amend petition is inconsistent with the Court's explanation of the scope of the case in 1993. The first motion is irrelevant.²² The second sought an apportionment

²² On January 11, 1988, Nebraska filed a motion which sought to have the Court construe the existing Decree as apportioning the waters of the North Platte for the maintenance of instream
(*cont'd*)

of the previously unapportioned, nonirrigation season flows of the North Platte because those flows are relied upon by equitable interests in Nebraska, including irrigation, hydro-power, municipalities, recreation, and fish and wildlife. Based on Master Olpin's recommendation, the Court denied the motion without prejudice for lack of ripeness. *Nebraska v. Wyoming*, 113 S. Ct. 1941 (1993).

Count IV of Nebraska's Amended Petition seeks an equitable apportionment of flows during the nonirrigation season, *i.e.*, protection of nonirrigation season flows from further depletion by Wyoming.²³ Special Master Olpin has twice recommended against such an apportionment on the ground that the matter was not ripe. *See generally* letter from Special Master Olpin to Justice Byron R. White dated April 9, 1992 (Docket No. 464); Third Interim Report at 47-55.

In acting on the earlier motions, Master Olpin determined that the resolution of issues already in the case will "inform" a nonirrigation season apportionment. In recommending against Nebraska's first request for an apportionment of nonirrigation season flows, Master Olpin stated:

The time will likely come when a year around apportionment will be needed, but for now I recommend going forward with the discrete claims that are already before the Court, some of which do involve nonirrigation season natural flows. The resolution of those discrete claims will inform any subsequent proceeding dealing more comprehen-

flows. The motion was limited to irrigation season flows and was summarily denied. *Nebraska v. Wyoming*, 485 U.S. 931 (1988) (Docket No. 59).

²³ In the pending motion for leave to amend its pleadings, Nebraska renewed its motion to apportion the nonirrigation season flows based on the over-appropriated condition of the North Platte during the nonirrigation season. Master Olpin again recommended denial of Nebraska's motion in this regard for lack of ripeness. *See* Third Interim Report at 47-55. Nebraska has not taken exception to Master Olpin's recommendation.

sively with the apportionment of nonirrigation season natural flows.

Letter from Special Master Olpin to Justice Byron R. White dated April 9, 1992 at 6 (Docket No. 464). Similarly, in his Third Interim Report, Master Olpin stated: "Moreover, the examination during trial of concrete nonirrigation season injury claims asserted by Nebraska with respect to both the Laramie River, Deer Creek, and other issues in the case will inform any subsequent case there may be on the nonirrigation season." Third Interim Report at 49.²⁴

With respect to the Laramie River, Deer Creek, and other issues already in the case, evidence will be introduced at trial regarding the impacts during the nonirrigation season and below Tri-State Dam. The only way that these issues can "inform" a nonirrigation season apportionment, however, is if the evidence comes in. Through its exception, Wyoming seeks to preclude the very evidence that the Master relied on in recommending against a nonirrigation season apportionment. Were it not for the introduction of evidence of nonirrigation season impacts relating to issues already in the case, such as Deer Creek and the Laramie River, Special Master Olpin may well have recommended a nonirrigation season apportionment.²⁵

²⁴ Special Master Olpin also stated:

My recommendation to deny [Count IV] is grounded in several considerations concerning the development of the case. I believe that the trial on issues already in the case, such as Wyoming's proposed developments on the Laramie River and Deer Creek, will inform any later case that the Court may find justiciable concerning non-irrigation season flows . . .

Id. at 35-36.

²⁵ If the Court were to exclude evidence of impacts of new developments during the nonirrigation season and below Tri-State, it would have to reconsider Count IV because the basis of Master Olpin's recommendation, *i.e.*, lack of ripeness, would be gone.

In sum, in ostensibly seeking to limit the case to the presentation of evidence to "more clearly define the existing apportionment," Wyoming is asking the Court to ignore its 1993 decision. Wyoming is also asking the Court to address the Laramie River and Deer Creek issues in the context of 1945 conditions without any evidence of changed conditions pursuant to ¶ XIII(c) and (f) of the Decree. In other words, Wyoming would like to foist its proposed development on Nebraska in the context of its modern-day equity, but limit Nebraska to an evaluation of Wyoming's proposed development in the context of irrigation season equities in 1945. The 'clear definition' that Wyoming seeks of the 1945 apportionment is nothing more than a lopsided playing field.

B. In the Original Litigation, the Court did not Limit the Scope of Evidence to Needs and Impacts above Tri-State Dam.

Aside from a modern-day balancing of equities required to modify the Decree, Wyoming argues that if the Court allows Nebraska to introduce evidence of the impacts of upstream development on water users below Tri-State Dam, it will somehow "enlarge the geographic limit of the apportionment." Wyoming's Brief in Support of Exceptions at 13. Wyoming attempts to restrict the scope of the evidence by asking the Court to define the existing apportionment as embracing only irrigation interests served by canals diverting between Whalen and Tri-State Dam, as opposed to interests below TriState. The Court has twice addressed this issue and neither time did it agree with Wyoming. Principles of *res judicata* and the law of the case apply equally in this respect.

In the original litigation, the Court heard evidence of water needs some 300 miles below Tri-State Dam. *See supra* p. 1-4 (Statement of the Case). It was only after a consideration of all of the evidence, including a determination that local supplies were sufficient to satisfy needs below Tri-State without participating in the direct apportionment of natural

flows above Tri-State, that Master Doherty was able to limit the proportionate allocation in Nebraska to Tri-State Dam. Wyoming has not disputed that evidence was introduced in the original litigation well below Tri-State Dam. All Master Olpin has recommended is that the scope of the evidence remain broad enough for him to make an informed recommendation to the Court on the merits.

Additionally, Master Olpin and the Court addressed this issue on the cross-motions for summary judgment. Wyoming argued then, as now, that Nebraska's apportionment was limited by the Decree to uses supplied by diversions at and above Tri-State Dam. Wyoming's Second Motion for Summary Judgment and Brief in Support at 57-85 (Feb. 22, 1991) (Docket No. 294). After recognizing that the return flows below Tri-State were a predicate to the Decree, Master Olpin recommended that the Court deny Wyoming's motion on all below Tri-State issues on the ground that they were "too theoretical and not sufficiently anchored to concrete pleadings or an adequately developed factual Record" Owen Olpin, Special Master, Second Interim Report on Motions for Summary Judgment and Renewed Motions for Intervention at 92 (Apr. 9, 1992) (Docket No. 463). The Court adopted the Master's recommendations with respect to Tri-State. 113 S. Ct. 1700-01. Accordingly, the Court has already denied Wyoming's attempt to preclude evidence of uses and impacts below Tri-State.

POINT III

THE CONTRIBUTIONS OF HORSE CREEK TO THE NEEDS OF NEBRASKA USERS BELOW TRI-STATE ARE AN INTRINSIC PART OF THE APPORTIONMENT OF NATURAL FLOWS FOR DIRECT DIVERSIONS ABOVE TRI-STATE

In Count I of its Amended Petition, Nebraska alleges that Wyoming is presently violating and threatening to violate Nebraska's apportionment by "[r]educing the flow of

tributaries entering the North Platte River below Alcova by means of . . . the depletion of return flows, and the construction of reservoirs." Nebraska's Amended Petition at 4 (§ 11.b.). Specific examples of activities in Wyoming which support Nebraska's allegation include "reregulating reservoirs and canal linings in the Goshen Irrigation District and the Horse Creek Conservancy District . . ." ²⁶ *Id.* at 5 (§ 12). Wyoming objected to Count I as it related to Horse Creek on the ground that Horse Creek flows were not included in the 1945 apportionment because it joins the North Platte below Tri-State Dam. Wyoming's Response to Nebraska's Amended Petition at 24-28.²⁷ Wyoming also contended that Nebraska was required to show injury as a threshold requirement and that Nebraska had not done so. *Id.* at 25.

In recommending that Nebraska's Count I be granted, Special Master Olpin rejected Wyoming's argument that return flows below Tri-State Dam, including inflows from Horse Creek, were outside the scope of this proceeding:

Because return flows from streams such as Horse Creek furnished the predicate for limiting Nebraska's apportionment to the canals diverting at and above Tri-State-Dam, Nebraska should have the opportunity to present evidence of significant depletions of those return flows. Stated another way, if Wyoming were allowed with impunity to deplete flows that were a predicate for the geographic limits of Nebraska's apportionment, Nebraska could argue persuasively that the geographic limits of her apportionment should be extended to the river sections downstream of Tri-State Dam.

²⁶ Reregulating reservoirs are designed to capture return flows for further use and depletion.

²⁷ Wyoming Response to Nebraska's Motion for Leave to File Amended Petition (May 2, 1994) (Docket No. 651) ("Wyoming's Response to Nebraska's Amended Petition").

Third Interim Report at 43. The Master also concluded that Wyoming's argument that Nebraska had to show injury with respect to its Horse Creek claims was wrong as a matter of law. *Id.* at 42. The Master further stated that Wyoming's contention was answered "by the showing that Nebraska has made concerning Horse Creek's contribution to the natural flows in the pivotal reach." *Id.* Master Olpin relied on evidence from the original proceedings showing Horse Creek's substantial inflow to the North Platte River of 21,900 acre feet annually during the irrigation season and 13,900 acre feet annually during the nonirrigation season. *Id.* Nebraska also had alleged actions by Wyoming that threatened the contributions. *Id.*

Wyoming's argument regarding the geographical scope of the apportionment fails to account for Special Master Doherty's use of return flows, including those of Horse Creek, to supply Nebraska uses below Tri-State Dam. *See also supra* p. 1-4 (Statement of the Case). The availability of return flows in certain reaches of the river, at certain times of the year, and in certain quantities was a factual predicate of the equitable apportionment.²⁸

In the original litigation, Nebraska showed that an annual average of 311,000 acre feet of return flows were available

²⁸ Return flows from diversions under appropriative rights which have returned to the stream are subject to appropriation. *See* 2 W. A. Hutchins, *Water Rights Laws In The Nineteen Western States* 579-91 (1974). Hutchins observed that "[t]he downstream flow of many Western streams has been augmented by seepage from irrigation of upstream lands. This is a common phenomenon in irrigated valleys, and much development has been predicated wholly or partly upon the existence of return flow." *Id.* at 580.

In the 1945 decision in *Nebraska v. Wyoming*, the Court spoke of equitable apportionment as a "flexible doctrine" calling for "the exercise of an informed judgment on a consideration of many factors" including "the character and rate of return flows . . ." 325 U.S. at 618; *see also Colorado v. New Mexico*, 459 U.S. 176, 183 (1982).

for diversion below Tri-State Dam during the irrigation season for the 1931-1936 period of record. *See* Nebraska Exhibit No. 413. Wyoming contended that an annual average of 361,900 acre feet of return flows were available during that same period of time. *See* Wyoming Exhibit No. 98.

At the insistence of Wyoming, the flows of Horse Creek were considered as part of that source of supply for Nebraska uses below Tri-State Dam. According to Wyoming Exhibit No. 178, over the 1931-1940 drought period, Horse Creek contributed 38,500 acre feet to the North Platte River annually.²⁹ The Horse Creek contributions to the North Platte River are largely return flows.

When Special Master Doherty compared the available supply below Tri-State Dam with the requirements of the canals between Tri-State and Bridgeport, he concluded that local supplies, primarily return flows, were adequate to meet the irrigation needs of canals diverting below that point.³⁰ Doherty Report at 95-96. *See also* Wyoming Exhibit Nos. 164, 177, 178. Master Doherty relied upon Horse

²⁹ The contribution of Horse Creek to the North Platte appears in Wyoming Exhibit Nos. W-177, W-178, and W-179, Nebraska Exhibit Nos. N-78, N-84, N-431, and N-363 through 639, and Colorado Exhibit No. C-79. Nebraska calculated Horse Creek's contribution to the North Platte to be 25,000 acre feet at one time and 7,200 acre feet at another. Colorado testified that 55,000 acre feet would be available.

³⁰ Special Master Doherty specifically relied on Wyoming Exhibit Nos. W-177 and W-178 to insure that the Nebraska lands below Tri-State would continue receiving sufficient North Platte waters:

Wyoming's Exhibit 177 shows in detail the location of all channel and tributary accretions to the river in the [Tri-State Dam to Kingsley Reservoir] section, and Wyoming's Exhibit 178 sets up the accretions for the 1931-1940 period against the diversion requirements of the canals in the section. Together these exhibits furnish

(cont'd)

Creek as constituting 13.6% of the total tributary accretions between the state line and Bridgeport during the irrigation season. Wyoming's premise in the original litigation was that the Nebraska canals diverting downstream of Tri-State Dam could rely on Horse Creek as their principal source of supply. Special Master Doherty and the Court accepted Wyoming's premise. Doherty Report at 95-96; 325 U.S. at 596, 607, 655.

If Master Doherty had not considered evidence that was necessary to establish that the lands below Tri-State Dam would be satisfied by return flows and local supplies, Nebraska lands between Tri-State and Bridgeport would have been included in the allocation of direct natural flow from Wyoming. Horse Creek was determined by Master Doherty to be one of the principal sources of supply for uses in Nebraska below Tri-State Dam. Thus, Wyoming's present argument that a consideration of Horse Creek would require a new apportionment is inapposite. The argument that it is also outside the scope of this proceeding is contrary to Wyoming's position in the original litigation, as well as the determination made by Master Doherty and adopted by the Court.

Wyoming also contends in its third exception that Nebraska has not alleged sufficient injury regarding its Horse Creek claims. As Special Master Olpin correctly found, however, "Nebraska is not required to show injury to get into court" Third Interim Report at 42; *see also id.* at 33-34. A party is not required to show injury as a requisite to the adoption of a pleading. Moreover, as set forth above,

an apparent demonstration that the local supplies, even during the drouth period, were adequate to [supply] the needs of the canals without calling upon up-river water. Neither the supply data nor the mathematics of these exhibits is questioned by Nebraska.

Doherty Report at 94-95 (footnote omitted). The ultimate conclusion was that even in times of drought, Horse Creek would annually contribute 21,900 acre feet during the irrigation season and 13,900 acre feet during the nonirrigation season.

Horse Creek's contributions and Nebraska's allegation that Wyoming is depleting tributary inflow by reregulating reservoirs and canal linings below Alcova are sufficient to establish a cognizable claim. *See also id.* at 42.

In sum, Wyoming has not provided persuasive reasoning to change Master Olpin's recommendation that "Nebraska should have the opportunity to show that she will suffer substantial injury from Wyoming's proposed Horse Creek developments or . . . from Wyoming actions threatening depletions of significant sources of supply flowing out of Wyoming and entering the North Platte below Tri-State Dam." *Id.* at 43.

POINT IV

WYOMING CANNOT DEplete SURFACE WATERS APPORTIONED TO NEBRASKA BY PUMPING THE WATER OUT OF THE GROUND

Count I of Nebraska's Amended Petition alleges in part that Wyoming is taking Nebraska's share of apportioned water by depleting the tributary flows of the North Platte River below Alcova by groundwater pumping. Nebraska's Amended Petition at 4 (§ 11.b.). Count I also alleges that groundwater depletions in Wyoming are reducing the flow of the mainstem and tributaries throughout the North Platte River Basin, as well as the flow in canals carrying Nebraska's share of apportioned natural flow and storage water, in violation of Nebraska's apportionment. *Id.* at 4-5 (§ 11.c.).³¹

³¹ In Count III, Nebraska alleges that present and existing groundwater development, among other things, in the Laramie River basin in Wyoming is causing injury to Nebraska's beneficial use of and equitable reliance on the inflows of the Laramie to the North Platte River. Nebraska's Amended Petition at 9 (§ 6.d.). With respect to Count III, Wyoming's groundwater use constitutes one of Wyoming's present uses — one of Wyoming's equities — as the Court determines how to protect Nebraska's
(cont'd)

Wyoming objected to Nebraska's groundwater claims in Count I, arguing that the effect of groundwater depletions should not be included in these proceedings because "[t]he existing Decree does not limit the use of groundwater in any of the three states; it apportions only the surface flows of the North Platte." Wyoming's Response to Nebraska's Amended Petition at 29; *see also id.* at 29-31. Additionally, Wyoming argued that "unless and until Nebraska treats hydraulically connected groundwater as part of the surface flow through intrastate administration in Nebraska, it cannot expect the Court to impose such a standard [on Wyoming] as a matter of interstate apportionment." *Id.* at 31.

In his Third Interim Report, Special Master Olpin recommended that the Court grant Nebraska's motion for leave to file Count I in its entirety. Third Interim Report at 36-43. The United States agreed. The basis for the Special Master's decision allowing groundwater claims was twofold. *Id.* at 38-41. First, Wyoming has acknowledged the physical connection between ground and surface water and the potential depletive effect of groundwater pumping on surface flows. *Id.* at 38. The Master noted that "Nebraska and the United States have presented affidavits of experts showing that groundwater pumping in Wyoming sections of the North Platte Basin, both present and threatened, has the potential to deplete significantly the surface flows that are subject to the decree's seventy-five percent, twenty-five percent split." *Id.* at 39. Accordingly, the Master concluded that Wyoming could be taking Nebraska's apportioned water through groundwater pumping.

Second, rejecting Wyoming's "equitable argument" that the claims should not be allowed because Nebraska does not have conjunctive use laws, Master Olpin found that "it is the upstream state which is subject to decreed restrictions designed to protect the natural flows of the North Platte River

equitable interest in Laramie River waters. *See generally supra* p. 21-28 (Point II).

in the reach above the state line." *Id.* at 40. In other words, groundwater pumping in Nebraska is not depleting surface flows owed to Wyoming. *Id.* The Special Master found no legal or equitable basis to exclude evidence respecting injury to Nebraska caused by Wyoming's present and threatened groundwater pumping. *Id.* at 40-41.

In its fourth exception to the Special Master's Third Interim Report, Wyoming persists in complaining of the "recommendation to entertain Nebraska's claims to impose interstate ground water regulation in Wyoming under standards that Nebraska refuses to apply intrastate to its own ground water use." Wyoming's Exceptions at 2 (§ 4); *see also* Wyoming's Brief in Support of Exceptions at 37-41.

A. The Impacts of Wyoming's Groundwater Pumping on Nebraska's Apportioned Surface Flows are Significant.

Wyoming concedes that groundwater and surface waters are interrelated in the North Platte River Basin in Wyoming.³² Third Interim Report at 38. Wyoming also ac-

³² There is no dispute that the relationship between ground and surface water is an issue that is cognizable in the Court's original jurisdiction. In *Arizona v. California*, the Court fashioned a decree apportioning the waters of the Colorado River which recognized the interrelationship of surface and groundwater and defined consumptive use within a state to include "all consumptive uses of water of the mainstream, including water drawn from the mainstream by underground pumping" *Arizona v. California*, 376 U.S. 340 (1964).

In *Texas v. New Mexico*, 446 U.S. 540 (1980), and *Texas v. New Mexico*, 462 U.S. 554, 557 (1983), the Court directly considered the impact of ground water pumping in New Mexico on Texas' apportionment of surface flows under the Pecos River Compact, 63 Stat. 159 (1949). The Court observed that its exercise of jurisdiction in *Texas v. New Mexico* was based in part on the fact that "New Mexico is the upstream State, with effective power to deny water altogether to Texas except under extreme flood conditions" 462 U.S. at 568-69. It should also be noted that
(*cont'd*)

knowledges that groundwater pumping in Wyoming can and does in fact deplete surface flows. *Id.* Accordingly, Wyoming does not dispute that groundwater pumping in Wyoming is taking Nebraska's apportioned flows.

The impact of post-Decree well development in Wyoming on Nebraska's equitable apportionment is significant. *Id.* at 39. Based on Nebraska's preliminary estimates of well development in Wyoming, there are approximately 300 irrigation wells with adjudicated water rights providing irrigation water to 40,000 acres of land near the mainstem of the North Platte River from Alcova to the Nebraska-Wyoming state line.³³ Withdrawals from these wells are estimated to be 77,000 acre feet annually, with an annual net depletive effect of 38,500 acre feet. Most of these wells are located below Whalen Dam in the reach of the North Platte River that was divided 75%/25% between Nebraska and Wyoming. For the entire North Platte River Basin from Alcova to the Nebraska-Wyoming state line, including the Laramie River and Horse Creek Basins, groundwater with-

Texas has no laws facilitating the conjunctive management of surface water and groundwater.

In *Kansas v. Colorado*, 475 U.S. 1079 (1986), the Court extended its original jurisdiction to an enforcement action over obligations on the Arkansas River Compact, 63 Stat. 145 (1949), predicated almost entirely on the impact of upstream pumping on apportioned surface flows. In its First Amended Complaint, Kansas alleged:

In spite of its duties and obligations under the Compact, since 1949 the State of Colorado has allowed and permitted substantial increases in the diversion and use in Colorado of the surface and hydrologically related ground water of the Arkansas River

First Amended Complaint at ¶ 8, *Kansas v. Colorado*, No. 105, Original.

³³ See generally Nebraska's Reply to Wyoming's, Colorado's, and the United States' Responses to Nebraska's Motion for Leave to File an Amended Petition at 11-13 (May 16, 1994) (Docket No. 659).

drawals in Wyoming are approximately 182,000 acre feet annually, with approximately half of that quantity constituting the annual net depletion.

B. Groundwater Pumping That Takes Nebraska's Apportioned Water Presents a Legal As Opposed to an Equitable Issue.

Having admitted that Wyoming's groundwater pumping takes Nebraska's apportioned water, Wyoming's sole contention on exceptions is that "a simple principle of equity will control the issue" of whether the Court should hear Nebraska's claim that groundwater pumping in Wyoming is taking Nebraska's apportioned surface flows. Wyoming's Brief in Support of Exceptions at 38. Wyoming argues that the issue "turns on the basic equitable principle that Wyoming should not be subject to interstate restrictions that Nebraska will not impose as a matter of intrastate law." *Id.* at 40.

Wyoming misstates the issue. As Master Olpin correctly recognized, the issue is legal in nature, *i.e.*, whether Wyoming is violating the Decree by taking Nebraska's apportioned flows through groundwater pumping. Nebraska's allegation relates to the enforcement of the Decree. Wyoming cannot be allowed to continue to deplete — in increasing quantities — Nebraska's 75% share of natural flow through its groundwater pumping on the theory that such a practice is sanctioned because Nebraska does not have conjunctive use laws in place. Moreover, Wyoming is the upstream state. Pursuant to the Decree, Wyoming owes apportioned surface flows to Nebraska. Nebraska does not owe Wyoming or any other downstream state apportioned flows under the North Platte Decree. How Nebraska allocates its water internally is irrelevant to whether Wyoming is taking Nebraska's apportioned water before the water ever gets to Nebraska.

Finally, Wyoming argues that *Missouri v. Illinois*, 200 U.S. 496 (1906), and *Kansas v. Colorado*, 206 U.S. 46, 104-05 (1907), provide support for its position that Nebraska's

groundwater allegations should not be allowed as a matter of equity because Nebraska does not presently regulate for conjunctive use. Wyoming's Brief in Support of Exceptions at 38-39. As Wyoming nearly concedes, however, its reliance on *Missouri v. Illinois* is misplaced. *Id.* at 39. That case, as well as *Kansas v. Colorado*, stand for the proposition that relief on the merits may turn on equitable principles. While those cases may provide Wyoming with the basis for asserting factual defenses at trial, they have no relevance in testing the sufficiency of Nebraska's allegations.

As the Court observed earlier in this case, in an enforcement action "the only question is whether the [alleged] conduct violate[s] a right established by the decree." 113 S. Ct. at 1695. Nebraska's groundwater pleading amendments properly allege violations of the Decree within the purview of that holding.

CONCLUSION

The Court's opinion in 1993 set the foundation for trial in the manner proposed by the Special Master in his Third Interim Report. The Special Master aptly recommended that the First Counterclaim and First Cross-Claim are barred by *res judicata* because they seek to resurrect the mass allocation rejected in 1945. Nebraska's claims for injunctive relief on the Deer Creek and Laramie tributaries, along with the evidence requisite to an evenhanded evaluation, on the other hand, lie within the relief contemplated by ¶ XIII and the Court's 1993 opinion.

The Court should therefore adopt the Special Master's recommendations with one exception. The Court should reject his recommendation that jurisdiction should be exercised over Wyoming's Fourth Cross-Claim against the United States.

Respectfully submitted,

DON STENBERG

Attorney General of Nebraska

Department of Justice

2115 State Capitol

Lincoln, Nebraska 68509-8920

(402) 471-2682



RICHARD A. SIMMS

Counsel of Record

Special Assistant Attorney General

JAMES C. BROCKMANN

JAY F. STEIN

Simms & Stein, P.A.

430 West San Francisco Street

Post Office Box 280

Santa Fe, New Mexico 87504

(505) 983-3880